

State of Colorado



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Governor

John Zakhem
Board Chair

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Meeting Minutes June 20, 2006

The State Personnel Board met in public session on Tuesday, June 20, 2006, at the Colorado State Personnel Board, 633 17th Street, Suite 1400, Courtroom 1, Denver, Colorado 80202-3604.

The meeting was called to order at approximately 9:18 a.m. Board Members Troy Eid, Diedra Garcia, and Don Mares were present in person. Board Members Elizabeth Salkind and John Zakhem were absent. However, Elizabeth Salkind joined the meeting via teleconferencing at approximately 10:00 a.m.

Kristin F. Rozansky, Board Director; Assistant Attorney General Pam Sanchez, Board Counsel; and Jane Sprague, General Professional III, were present in person.

I. REQUESTS FOR RESIDENCY WAIVERS

A. June 1, 2006 Report on Residency Waivers

Director Rozansky reported that five requests for residency waivers have recently been filed at the Board: one each from the Department of Human Services, the Department of Public Safety, and the University of Colorado at Boulder, and two from the Department of Corrections. The requests are currently under review by the Director.

II. PENDING MATTERS

A. Petitions for Declaratory Order

1. Petition for Declaratory Order of the Colorado Federation of Public Employees (CFPE) v. Department of Personnel and Administration, State Personnel Board case number 2006D003.

Since Mr. Zakhem was not present and Mr. Mares and Ms. Salkind were recused from participation in the consideration of this matter,

there was no quorum for action, and the matter was tabled until the July Board meeting.

III. REVIEW OF INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR ON APPEAL TO THE STATE PERSONNEL BOARD

- A. Terry Miller v. Department of Higher Education, Board of Trustees, University of Northern Colorado, State Personnel Board case number 2005B112.

Mr. Mares moved to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to make the Initial Decision an order of the Board. Mr. Eid seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Mares. Ms. Salkind and Mr. Zakhem were absent.

- B. Patrick Ward v. Department of Natural Resources, Division of Wildlife, State Personnel Board case number 2004B143.

After discussion of the elements of a *prima facie* case of discrimination, Mr. Eid moved to remand the matter to the Administrative Law Judge solely for legal analysis regarding the fifth prong of the test for a *prima facie* case of discrimination based on a disability, as enunciated in *Community Hospital v. Fail*, 969 P.2d 667 (Colo. 1998), including, if necessary, holding an evidentiary hearing and reopening discovery. The Administrative Law Judge's decision is to be issued within thirty days of the signing of the Board Order, and, if appealed to the Board, is to be handled under the Board rules applicable to such appeals. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, and Mr. Mares. Ms. Salkind and Mr. Zakhem were absent.

IV. REVIEW OF PRELIMINARY RECOMMENDATIONS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR TO GRANT OR DENY PETITIONS FOR HEARING

- A. Nancy Resnick v. Department of Human Services, Colorado Mental Health Institute at Fort Logan, State Personnel Board case number 2005G021.

Ms. Garcia moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind.

- B. Sean McGuire v. Department of Revenue, State Personnel Board case number 2004G080(C).

Mr. Eid moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Mr. Mares seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind.

- C. Simone Belmonte v. Department of Corrections, Training Academy, State Personnel Board case number 2005G101.

Mr. Mares moved to adopt the Preliminary Recommendation of the Administrative Law Judge and deny the petition for hearing. Ms. Garcia seconded the motion. The motion passed on the affirmative vote of the following Board members: Mr. Eid, Ms. Garcia, Mr. Mares, and Ms. Salkind.

V. INITIAL DECISIONS OR OTHER FINAL ORDERS OF THE ADMINISTRATIVE LAW JUDGES OR THE DIRECTOR

- A. William Thomas Little v. Department of Corrections, State Personnel Board case number 2006B013 (May 25, 2006).
- B. Pamela Cress v. Department of Human Services, State Personnel Board case number 2005S012 (May 30, 2006).
- C. Betty Shea v. Department of Human Services, Division of Youth Corrections, Spring Creek Youth Service Center, State Personnel Board case number 2006B039 (May 31, 2006).
- D. Timothy Bennett v. Department of Corrections, State Personnel Board case number 2003B150(C) (June 1, 2006).

VI. REVIEW OF THE MINUTES FROM THE MAY 16, 2006 PUBLIC MEETING OF THE STATE PERSONNEL BOARD

Mr. Mares moved to approve the Minutes of the May 16, 2006 meeting as submitted. Ms. Salkind seconded the motion. The motion passed on the affirmative vote of the following Board members: Ms. Garcia, Mr. Mares, and Ms. Salkind. Mr. Eid abstained because he was not present at that meeting.

VII. ACKNOWLEDGMENTS

DECISIONS OF THE STATE PERSONNEL BOARD MADE AT ITS MAY 16, 2006 PUBLIC MEETING:

- A. Dan Wells and Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center, Auraria Library and Auraria Higher Education Center, State Personnel Board case number 2002B092(C).

In response to a Mandate/Order affirmed in Part, Reversed in Part and Remanded the Case with Directions from the Court of Appeals, the Board voted to enter an order reinstating the Administrative Law Judge's order regarding Rice, adopting the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge, in conformance with the order from the Court of Appeals.

- B. Petition for Declaratory Order of Barry Rice v. Department of Higher Education, University of Colorado at Denver, Auraria Media Center and Auraria Higher Education Center, State Personnel Board case number 2006D002.

The Board voted to deny the petition for declaratory order based on jurisdictional grounds.

- C. Patricia Jones v. Department of Corrections, State Personnel Board case number 2003B165.

The Board voted that, with regard to Complainant's Motion to Strike Certain Arguments and Attachments in Respondent's Reply Brief or Strike Brief in its Entirety, Complainant's request to strike Attachment 1, 2003 Layoff Process Audit: Department of Corrections, Final Report, Issued April 2006, is granted; and the remaining requests to strike the arguments on Finding #78 and Attachment 4 are denied. Complainant's Motion to Allow Sur Reply is denied as untimely. Board Rule 8-72B(A). Respondent's Motion to Strike Complainant's Sur Reply and Accompanying Motions as Untimely is rendered moot by the denial of Complainant's Motion to Allow Sur Reply. The Board also voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision.

- D. Leo Bellio v. Department of Revenue, Liquor & Tobacco Enforcement Division, State Personnel Board case number 2005B052(C).

The Board voted to adopt the findings of fact and conclusions of law in the Initial Decision of the Administrative Law Judge and to adopt the Initial Decision.

- E. Timothy Kosak v. Department of Transportation, State Personnel Board case number 2005G105.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- F. Cynthia A. Hernandez v. Department of Revenue, Colorado State Lottery, State Personnel Board case number 2006G047.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

- G. Ronnie Gail Clay v. Department of Corrections, Limon Correctional Facility, State Personnel Board case number 2006G046.

The Board voted to adopt the Preliminary Recommendation of the Administrative Law Judge and grant the petition for hearing.

VIII. REPORT OF THE STATE PERSONNEL DIRECTOR - JEFF WELLS

Mr. Wells appeared before the Board during the General Comments portion of the Board meeting. He told the Board that Board Counsel Sanchez' position on the constitutionality of the Department of Personnel and Administration's (DPA) rule on multiple vacancies, and in particular, on DPA's ability to select from a list of applicants without regard to rank, was jeopardizing the current and past personnel selection system in its entirety. Mr. Wells stated that there was not consensus between the Board's Counsel and DPA's Counsel; that Ms. Sanchez' position, as he understood it, was wrong; and he expressed a desire for the Board to instruct Ms. Sanchez to work with his lawyers to resolve the conflict.

Board Counsel Sanchez interjected to give the Board some background on what Mr. Wells was talking about, as she had not yet had an opportunity during this meeting to advise the Board of the substance of her meeting at the Attorney General's (AG) office last Friday. Ms. Sanchez reminded the Board that there had been two different views at the AG's office on both the substantive and jurisdictional authority regarding DPA's January 2006 version of the rule regarding multiple vacancies. Given that there was another version of the rule being promulgated as a result of DPA's rulemaking on May 30, 2006, Ms. Sanchez raised the issue with the Office of the AG in the context of the impending rule opinion in an effort to avoid the same conflict and to obtain direction on the AG's position regarding the jurisdictional and substantive concerns raised by the Board regarding the prior versions of the multiple vacancy rule, in order for the AG to render consistent advice on the current version of the multiple vacancy rule. Ms. Sanchez informed the Board of the meeting held last Friday at the AG's office and explained that the Solicitor General's rule opinion states that there may be issues regarding the constitutionality of the new rule considered at the May 30, 2006, rule making hearing by DPA. Ms. Sanchez then explained to Mr. Wells that, although she was happy to discuss the issue with

him or his counsel, given that the Solicitor General had opined on the matter, that is the controlling opinion for the AG's office and any concerns regarding the rule opinion would be best addressed to the Solicitor General, as no one at Ms. Sanchez' level had any authority to speak to it.

Mr. Wells continued to present his position to the Board and reiterated his view that, by maintaining that there may be constitutional problems in selecting an applicant from a list of names without regard to rank, the Solicitor General, and Board Counsel Sanchez, and the Board rendered the current and past selection system vulnerable to liability. Mr. Wells wanted to make sure that the Board understood what taking such a position had done and the implications for the entire selection system currently in place. Ms. Sanchez advised Mr. Wells that, as he no doubt had been advised by his own counsel, there was discussion in the Attorney General's meeting last Friday regarding the impact of the rule opinion on DPA's liability and that both his counsel and Board Counsel Sanchez had raised the issue of liability in the context of the existing selection process with regard to multiple vacancies. Ms. Sanchez explained that the attorneys had discussed with the Solicitor General that if DPA's current practice is consistent with the practice set forth in the proposed rule, then one could argue that by implication the current selection system for multiple vacancies is also vulnerable on constitutional grounds.

The Board asked Mr. Wells what it was he wanted from the Board. He told the Board he wanted them to instruct Ms. Sanchez to work with his counsel, to acknowledge that he had jurisdiction to promulgate a rule on the issue of multiple vacancies, to concede that DPA's position on selection without regard to ranking was correct, and to adopt DPA's approach to multiple vacancies. Citing to both the Colorado Constitution and § 24-50-112.5, C.R.S., he stated that is troubling that there had not been a problem for the past 30 years out of the Attorney General's office regarding the selection system, and that, according to the constitution, the Board may limit what the Personnel Director does, but only after the rule is promulgated by the Personnel Director, who makes all selection rules. Board Counsel Sanchez then advised the Board that before taking any action, she would need to address the various legal issues regarding this matter in Executive Session.

IX. ADMINISTRATIVE MATTERS & COMMENTS

A. ADMINISTRATIVE MATTERS

- Cases on Appeal to the Board and to Appellate Courts
- Order Affirmed in Cookson v. Department of Transportation, State Personnel Board case number 2003G139, Court of Appeals number 05CA1031

In addition to the above matters, Acting Chair Garcia announced that this June meeting is Elizabeth Salkind's last meeting, as her term is up June 30, 2006, and read from a plaque presented to Ms. Salkind, thanking her for her five years of service to the Board. Ms. Garcia then announced that Rich Djokic, the former Director of the State Personnel Board, had been elected to serve on the Board and thanked the other candidates, Kathy Newell and Ira Sanders, for their interest in serving on the Board. Finally, Ms. Garcia announced that Troy Eid had been nominated by President Bush for appointment to Colorado's U.S. Attorney position and was, therefore, resigning from the Board so as to avoid all appearances of conflict. The governor will be appointing a new Board member to replace Mr. Eid and to complete his term, which expires June 30, 2009. Both Ms. Salkind and Mr. Eid thanked the Board members and staff for their hard work and for the privilege of serving on the Board.

B. OTHER BOARD BUSINESS

- **Staff Activities**

Director Rozansky reported on staff activities at the Board, including the budget process; Risk Management Training that she conducted in Durango and Grand Junction on June 15 and 16, 2006; construction of offices at the Board, for which she thanked Kruz Watkins for his assistance; rulemaking in August to amend Board Rule 4-28 (trial service); drafting by Board staff of the supplement to the Continuing Legal Education Employment Law chapter on practice before the State Personnel Board; and the Board election, recognizing the work of David Anthony and Joy Lindsay, both employees of the Department of Personnel and Administration, for their assistance in the electronic voting process and reconciling databases.

C. GENERAL COMMENTS FROM ATTORNEYS, EMPLOYEE ORGANIZATIONS, PERSONNEL ADMINISTRATORS, AND THE PUBLIC

The State Personnel Director, having missed his place on the agenda and joining the meeting late, made his report to the Board during this section. The details of the State Personnel Director's report are set forth under that section of the minutes.

X. PROPOSED LEGISLATION AND/OR RULEMAKING

XI. EXECUTIVE SESSION

A. Case Status Report

- B. Minutes of the May 16, 2006 Executive Session
- C. Other Business

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APPROVED THIS 15th DAY OF AUGUST, 2006.

Diedra Garcia, Acting Chair

Troy Eid, Member

Donald J. Mares, Member

Elizabeth Salkind, Member